Neutral Citation No: [2023] NICA 29 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE11870** *ICOS No:* **21/99126** *Delivered:* **16/05/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF APPLICATIONS BY RISTEARD O'MURCHU AND DARREN WILLIAMS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Between:

DARREN WILLIAMS

Applicant/Appellant

and

MINISTER FOR HEALTH FOR NORTHERN IRELAND
and
DEPARTMENT OF HEALTH FOR NORTHERN IRELAND

Respondents/Respondents

_____

Mr Conan Fegan(instructed by McIvor Farrell Solicitors) for the Appellant
Dr Tony McGleenan KC with Mr Philip McAteer (instructed by Departmental Solicitor's Office) for the Proposed Respondents

_____

Before: Keegan LCJ & Treacy LJ

_____

TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] The appellant appeals against the judgment of Colton J refusing leave reported at [2022] NIQB 12.

[2] This appellant seeks to challenge regulations that were made by the Department of Health ("the Department") in the exercise of powers conferred by provisions in the Public Health Act (NI) 1967 ("the 1967 Act). The Health Protection

(Coronavirus, Restrictions) Regulations (NI) 2021 (Amendment No. 19) Regulations (NI) 2021 ("the Regulations") came into operation at 5:00pm on 29 November 2021 in Northern Ireland. Their effect was to introduce provisions requiring Covid-Status certification in various settings set out in the regulations which were deemed high risk. The preamble to the Regulations states that they were made in response to the serious and imminent threat to public health posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in Northern Ireland. By reason of urgency the Regulations were made in accordance with section 25Q of the 1967 Act.

GDPR issue

[3] This appellant alleges breaches of the General Data Protection Regulations ("GDPR"). This issue was also raised in the application brought by Risteard O'Murchu. It was agreed that Colton J would deal with this issue in the case of *Williams* there being no material difference between the appellants' applications on this issue. The principal issues raised by this appeal are whether Colton J was correct to dismiss the application on the basis that the appellant lacked standing and that the case is academic.

[4] On the GDPR issue the appellant relied on three principal grounds which the judge summarised as follows:

- First, the proposed respondents have failed to comply with Article 5(1) of the GDPR and section 68 of the Data Protection Act 2018 ("DPA") and Article 6 GDPR/section 8 of, and Schedule 9 to, the DPA in allowing the unlawful processing of sensitive special category personal data in relation to data subjects in circumstances where it was not necessary to process personal data at all to achieve their legitimate aims.

- Secondly, the proposed respondents failed to comply with Article 35 GDPR and section 64(3)(d) DPA in that they did not carry out an adequate data protection impact assessment ("DPIA") prior to the regulations being brought into operation.

- Thirdly, the proposed respondents failed to consult pursuant to the implied statutory duty under section 64 DPA and/or at common law.

[5] In *Williams* the judge identified "the first and most obvious issue" as the appellant's standing. As someone who is not vaccinated the processing about which he complained will never apply to him. In those circumstances the appellant argued standing on the grounds of the "public interest." Order 53 rule 3(5) of the Rules of the Court of Judicature (NI) 1980 provides that:

> "The court shall not, having regard to section 18(4) of the Act, grant leave unless it considers that the applicant has

> a sufficient interest in the matter to which the application relates."

[6] The appellant is not a data subject in respect of the provisions about which he complains, nor had he been prohibited from entering the various venues referred to in the Regulations as there was an alternative means for him to certify his status.

[7] The regulations were introduced on 29 November 2021 and were subject to two weekly reviews by the Executive Committee. As of 20 January2022 the regulations only applied to nightclubs and venues providing indoor events where some or all of the audience are not normally seated with 500 or more attendees. The judge noted that the appellant had only filed his affidavit after the majority of the restrictions were removed. At the time of the judgment appealed against it was anticipated that these remaining restrictions would be shortly removed. The restrictions have now been removed in their entirety.

[8] The regulations were introduced as emergency measures in the midst of a public health emergency. They were discussed by the Executive Committee on a number of occasions prior to their approval. They were also the subject of subsequent debate in the Northern Ireland Assembly.

[9] Throughout this process there had been ongoing engagement between the proposed respondents and the Information Commissioner's Office who neither vetoed nor opposed the scheme.

[10] Significantly, the court noted at para [35] that:

> "the court …. has not received any legal challenge to these regulations from any person actually affected by the complaint here, namely those who are vaccinated. This is in the context when according to a survey by the Department of Health published on 27 October 2021 it is estimated that 93.8% of the adult population in Northern Ireland has been vaccinated (at least one dose) and 82% of adults have received two or more doses. There was another challenge brought to these regulations by Risteard O'Murchu who was also unvaccinated. The court has rejected his application and this judgment should be read in conjunction with the judgment in that case."

[11] As the judge observed the key question for the court in exercising its discretion to grant leave for judicial review in this case related to the utility of the court hearing and determining the matter. The court accepted that there is a legal argument about whether or not the data processing complained about in this case is "necessary" within the context of the statute and regulations. However, the court

was also conscious that it will be slow to interfere in a decision as to what is reasonably necessary in the context of a public health emergency when decisions are taken by elected representatives, who, he said, are best placed to assess the public interest.

[12] In coming to the conclusion that this was not an appropriate case to grant leave the judge said:

> "The court is influenced by the fact that the applicant himself is not affected by the illegality he alleges and has insufficient standing. Furthermore, in reality, there is little or no real live issue to be determined by the court in light of the much reduced application of the regulations, which may well be fully removed at the time of delivering of this ruling. It does not consider that there is a public interest in conducting a review of the regulations in this context and considers that a review would be of no utility. The court also notes the ongoing engagement between the proposed respondents and the ICO which is a further factor in ensuring compliance with Data Protection obligations."

[13] We are in full agreement with these observations which apply with even greater force now. The appellant lacked standing, the challenge is wholly academic, serves no utility and there is no public interest or good reason that this court can discern which would justify determining such a plainly academic matter. The appeal is dismissed.